In The

Supreme Court of the United States

No. 9. October Term, 1951.

DONALD R. DOREMUS and ANNA E. KLEIN,

Appellants,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE and THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of the State of New Jersey.

BRIEF FOR APPELLEE STATE OF NEW JERSEY.

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TABLE OF CONTENTS.

TABLE OF CITATIONS OF CASES.

CONSTITUTIONAL PROVISIONS.

United States Constitution.

New Jersey Constitution of 1844.

New Jersey Constitution of 1947.

Constitution of Iowa.

STATUTES.

MISCELLANEOUS AUTHORITIES.

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OPINIONS BELOW.

The opinion of the Supreme Court of the State of New Jersey (R-22-38) is reported at 5 N. J. 435, 75 A. (2d) 880. This opinion affirmed a decision of the Superior Court of the State of New Jersey, Law Division, whose opinion (R-7-20) is reported in 7 N. J. Super. 442, 71 A. (2d) 732.

JURISDICTION.

The judgment and mandate of the Supreme Court of New Jersey was entered on October 16, 1950 (R-21). An order allowing appeal to the Supreme Court of the United States was made by Mr. Justice Burton on January 12, 1951, and filed January 19, 1951 (R-38). A Statement as to Jurisdiction having been filed with this Court in accordance with Rule 12, on March 12, 1951, this Court made its order in which further consideration of the question of jurisdiction of this Court and of the motion to dismiss or affirm was postponed to the hearing of the case on the merits (R-43).

STATUTES INVOLVED.

The statutes involved are Revised Statutes of New Jersey (1937) 18:14–77 and 18:14–78.

R. S. 18:14–77 provides:

> "At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R. S. 18:14–78 provides:

> "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

The First Amendment to the United States Constitution provides in part:

> I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

The Fourteenth Amendment to the United States Constitution provides in part:

> XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of Life, Liberty, or Property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

COUNTER-STATEMENT OF QUESTIONS INVOLVED.

1. Have Appellants in this cause suffered injury sufficient to permit them to maintain this action and, if so, are they estopped by their acquiescence in the practices complained of?

2. Is the New Jersey Statute R. S. 18:14–77 providing for the reading, without comment, of verses from that portion of the Holy Bible known as the Old Testament in the public schools of this State constitutional under the First and Fourteenth Amendments of the United States Constitution when the pupils are permitted to be excused from the classroom during said reading upon request?

3. Is the New Jersey Statute R. S. 18:14–78 permitting the repeating of the Lord's Prayer in the public schools of this State constitutional under the First and Fourteenth Amendments of the United States Constitution when the

pupils are permitted to be excused from the classroom during such repetition upon request?

COUNTER-STATEMENT OF FACTS.

The statement of facts set forth in appellants' brief (Ab-4) is substantially correct. However, appellee State of New Jersey brings to the Court's attention the fact that the daughter of appellant, Anna E. Klein, is no longer a student in the public schools of the appellee, she having graduated therefrom.

Appellee State of New Jersey stresses that the question of constitutionality under the First and Fourteenth Amendments of the United States Constitution was not the sole issue below, but appellees jointly argued that the appellants were without legal standing to press their claim; that appellants were estopped; that appellants had waived their rights; and that the long existence of the statutes in question, without challenge, had established their validity. In fact, the New Jersey Supreme Court, speaking through CASE, *J.*, stated that the points had substance but the Court nevertheless concluded to dispose of the appeal on its merits. (R. 24-25.)

ARGUMENT.

POINT I.

Appellants, by their actions, have estopped themselves and waived their right to question the constitutionality of the statutes under examination.

A person may by his acts, or omissions to act, waive a right which he might otherwise have under the provisions of a constitution. Where such acts, or omissions, have intervened, a law will be sustained which otherwise might have been held invalid if the party making the objections

had not by prior acts precluded himself from being heard in opposition. Thus, a person who has acquiesced in the proceedings under a statute may not question its constitutionality.

The statutes now for the first time under attack have been on the books of the State of New Jersey in substantially the same form for the past 35 years and 48 years, respectively. In all that time, so far as we have been able to ascertain, neither the present plaintiffs nor anyone else has ever attacked them.

It is admitted in the facts of the case at Bar (Ab-4) that neither the parents nor the daughter has ever asked to be excused while the school authorities were dutifully complying with the statutes under examination but, on the contrary, the daughter participated and was present at such compliance with the statutes on each and every school day when she was not absent for other reasons. In fact, and by inference, the injury, damage or harm that is allegedly being done must either be decidedly minimum and of no consequence, or nonexistent because the student through her own acquiescence and that of the parent actively participated in that portion of the school day's work.

POINT II.

Neither the First Amendment nor the Fourteenth Amendment was ever intended to forbid recognition by the State of religion of the Deity, as opposed to State insistence on sectarian religious education.

The preamble of the New Jersey Constitution of 1844 reads as follows:

> "We, the people of the State of New Jersey, grateful to *Almighty God for the civil and religious liberty* which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this constitution:" (Italics ours.)

This preamble has been carried over into the Constitution of 1947.

The Fourteenth Amendment to the United States Constitution was adopted by the requisite number of States and became a part of that constitution in the year 1868. Under the Tenth Amendment to the Federal Constitution all powers not delegated to the United States by the Constitution or prohibited by it to the States are reserved to the States respectively or to the people. When the Fourteenth Amendment was adopted in 1868 the drafters of the Amendment must have contemplated and been aware of the New Jersey Constitution of 1844 and similar State Constitutions then in existence and therefore recognized that the State of New Jersey and the other States were and are in fact composed of religious peoples. Therefore, any prohibition contemplated by the Fourteenth Amendment must be directed not against religion as such but against sectarianism or the preference of one religious sect over another. In none of the cases decided by the various State courts has it been determined that Bible reading constitutes sectarianism.

The consciousness of the drafters of the Fourteenth Amendment, to the reference made to a Supreme Being in the New Jersey P eamble would have specifically necessitated mention by them of a prohibition against religion if they had meant to prevent the States from indulging in anything but the establishment of a State Church or the preference of one or more sects over others,

That this is the proper view is clearly demonstrated by the language of one historian who wrote on the subject 115 years ago, not long after the adoption of the First Amendment. In discussing the meaning attributed to that Amendment by James Madison, one of our founding fathers, he said:

> "Mr. Madison said he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner con-

trary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enable them (sic) to make laws of such a nature as might infringe the rights of conscience and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it was as well expressed as the nature of the language would admit."

III. Jonathan Elliott—The Debates in Several State Conventions on the Adoption of the Federal Constitution (1836), page 730.

And at page 731 of the same work:

"Mr. Madison thought, if the word 'national' was inserted before religion, it would satisfy the minds of (the) honorable gentlemen. He believed that the people *feared one sect might obtain a pre-eminence,* or two combine together, and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced, it would appoint the amendment directly to the object it was intended to prevent.'" (Italics ours.)

The same author states that Benjamin Huntington, of Rhode Island, expressed fear that the First Amendment would be harmful to religion and expressed his wish that "the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all." (Pages 730 and 731.)

When read together, R. S. 18:14–77 and R. S. 18:14–78 express the true meaning and intent of the First Amendment to the Constitution of the United States. They pro-

vide for that kind of recognition of God in the opening exercises of the public schools which does not involve sectarianism, namely, the reading of the Old Testament, without comment, and the repeating of the Lord's Prayer, but prohibit any sectarianism in public schools, namely, any other religious service or exercise. This completely eliminates doctrine, creed, dogma and every other phase of sectarianism. In fact, these statutes, by providing for the reading of the Bible, *without comment*, and the repeating of the Lord's Prayer, contain a lesser element of recognition of God than the preamble of the New Jersey Constitution of 1844 (included in the 1947 Constitution without change), which recognizes "Almighty God" as the One who has so long permitted us to enjoy civil and religious liberty. It is self-evident that, if the New Jersey Legislature was without power to enact R. S. 18:14–77 and R. S. 18:14–78, then the people of New Jersey had no right to include an even greater recognition of God in their State Constitution, which recognition of "Almighty God" appears again in Article I, paragraph 3, of the New Jersey Constitution. The First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment, does not, and was never intended to, prohibit the State recognition of God contained in the challenged statutes and the New Jersey Constitution.

There is a wealth of authority to the effect that the Bible is not a sectarian book, that it is read in the schools to inculcate fundamental morality, and that a statute authorizing the reading of the Bible, particularly the Old Testament, without comment, in the opening exercises of public schools, is not a law authorizing an unconstitutional use of tax-supported school property and the tax-supported school system, and is not a law respecting an establishment of religion, or prohibiting the free exercise thereof: *Vidal* vs. *Girard's Executors* (1844), 2 How. 127, 11 L. Ed. 205, at 200; *Donahoe* vs. *Richards* (1854), 38 Me. 379, 61 Am. Dec. 256; *Com. ex rel Wall* vs. *Cooke* (1859) 7 Am. L. Reg. (Mass.) 417; *Soiller* vs. *Woburn* (1866), 94 Mass. 127;

Moore vs. *Monroe* (1884), 64 Iowa 367, 20 N. W. 475, 52 Am. Rep. 444; *Hart* vs. *School Dist.* (1885), 2 Lane. Law Rev. (Pa.) 342; *North* vs. *University of Illinois* (1891), 137 Ill. 296, 27 N. E. 54; *Nesle* vs. *Hum* (1894), 1 Ohio N. P. 140; 2 Ohio S. & C. P. Dec. 60; *Pfeiffer* vs. *Board of Education* (1898), 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536; *Curran* vs. *White* (1898), 22 Pa. Co. Ct. 201; *Stevenson* vs. *Hanyon* (1898), 7 Pa. Dist. R. 585; *State ex rel Freeman* vs. *Scheve* (1902), 65 Neb. 853, 91 N. W. 846, 59 L. R. A. 927, Motion for rehearing overruled in (1903), 65 Neb. 876, 93 N. W. 169, 59 L. R. A. 932; *Billard* vs. *Board of Education* (1904), 69 Kan. 53, 76 Pac. 422, 66 L. R. A. 166, 105 Am. St. Rep. 148, 2 Ann. Cas. 521; *Hackett* vs. *Brooksville Graded School Dist.* (1905), 120 Ky. 608, 87 S. W. 792, 69 A. L. R. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 36; *Church* vs. *Bullock* (1908), 104 Tex. 1, 109 S. W. 115, 16 A. L. R. (N. S.) 860; *Herald* vs. *Parish Bd.* (1915), 136 La. 1034, 68 So. 116, L. R. A. 1915D 941, Ann. Cas. 1916A 806; *Knowlton* vs. *Baumhover* (Iowa Supréme Ct., 1918), 182 Iowa 691, 166 N. W. 202, 5 A. L. R. 841, at 857; *Wilkerson* vs. *City of Rome* (1922), 152 Ga. 762, 110 S. E. 895, 20 A. L. R. 1334; People ex rel. *Vollmar* vs. *Stanley* (1927), 81 Colo. 276, 255 P. 610; *Kaplan* vs. *Independent School Dist.* (1927), 171 Minn. 142, 214 N. W. 18, 57 A. L. R. 185; *Lewis* vs. *Board of Education* (1935), 157 Misc. 520, 285 N. Y. S. 164, modified in other respects in (1936) 247 App. Div. 106, 286 N. Y. S. 174, rehearing denied in (1936), 247 App. Div. 873, 286 N. Y. S. 751, Appeal dismissed in (1937) 276 N. Y. 490, 12 N. E. (2d) 172; 16 C. J. S. 604, sec. 206, notes 87, 88; 12 Corpus Juris 943, sec. 451, note 69; 47 American Jurisprudence 499, sec. 209, notes 16, 17, 18—452, sec. 213, notes 2, 3; 16 L. R. A. (N. S.) 861; 5 A. L. R. 866; 141 A. L. R. 1145; 105 Am. St. Rep. 153; 2 Ann. Cas. 522; 19 Ann. Cas. 234; Ann. Cas. 1916A 812.

The same is true of the repeating of the Lord's Prayer in the opening exercises of public schools. *Moore* vs. *Monroe, supra; Billard* vs. *Board of Education, supra; Hackett* vs. *Brooksville Grade School District, supra; Church* vs. *Bullock, supra;* 47 American Jurisprudence 450, sec. 210, notes 7, 8; 47 American Jurisprudence 453, sec. 213, note 3.

The Court's attention is particularly called to the case of *Lewis* vs. *Board of Education, supra* (in which an appeal was dismissed by the New York Court of Appeals, 276 N. Y. 490, 12 N. E. (2d) 172 (N. Y. Ct. App., 1937)).

The Court below (N. Y. Sup.) said (285 N. Y. S. 164, at 167):

> "Undisguised, the plaintiff's attack is on a belief and trust in God and in any system or policy or teaching which enhances or fosters or countenances or even recognizes that belief and trust. Such belief and trust, however, regardless of one's own belief, has received recognition in State and judicial documents from the earliest days of our republic."

The Bible itself is not a sectarian book. *Evans* vs. *Selma Union High School, District of Fresno County*, 193 Cal. 54, 222 P. 801, 802, 31 A. L. R. 1,121. (S. C., Cal. 1924.) To be sectarian, a book must teach the peculiar dogma of a sect as such and it is not so merely because it is so comprehensive as to include dogma by the interpretation of its readers. It must be a most limited version bespeaking only the limited creeds of a given sect. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship or the mechanical composition of the book, nor the use of it, but its contents, that give it its character. The question is not whether the version of the Bible used is canonical or apocryphal. Neither the King James translation of the Bible nor the Douay version of the Bible are sectarian books and the reading thereof without comment, in the public schools, does not constitute sectarian instruction. *Hackett* vs. *Brooksville Graded School District*, 120 Ky. 608, 87 S. W. 792, 69 L. R. A. 592, 117 Ann. St. Rep. 599, 9 Ann. Cas. 36 (Ky. S. C., 1905).

A prayer, offered at the opening of a public school for the aid and presence of the Heavenly Father, during the day's work, asking for wisdom, patience, mutual love and respect, looking forward to a heavenly reunion after death

and concluding in Christ's name, is not "sectarian," for a form of prayer, not authorized by a particular church is not "sectarian." *Hackett* vs. *Brooksville Graded School District, supra.*

If such be considered as not being "sectarian," surely, by analogy, a mere reading of the Bible, without comment, particularly a reading from the Old Testament, cannot be so construed. The Bible, not being sectarian, its reading without comment is thus not an expenditure of public money in aid of sectarian purpose. *People* vs. *Stanley*, 81 Colo. 276, 255 P. 610, 615. (S. C., Colo. 1927.)

POINT III.

The challenged statutes contain no compulsory feature.

There is no evidence in this case that the daughter of the plaintiff, Anna E. Klein, was ever compelled to do anything which infringed upon the religious belief, or disbelief, of herself or her parents, and the activities of the defendant board of education, in obeying said statutes, do not involve any compulsion.

In Cooley's Constitutional Limitations (1929), Eighth Edition, Volume II, page 983, it is stated that:

> "Whatever deference the constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy always is, to avoid with care any compulsion which infringes on the religious scruples of any, however little reason may seem to others to underlie them. * * *"

In *West Virginia State Board of Education* vs. *Barnette*, 319 U. S. 624, 87 L. Ed. 1628 (U. S. Sup., 1943), the lower court held that:

> "We are clearly of the opinion that the regulation of the Board requiring that children salute the flag is void *in so far* as it applies to children having conscien-

tious scruples against giving such salute and that, *as to them*, its enforcement should be enjoined." 47 F. Supp. 251, at 255. (D. C., W. Va., 1942.)

In other words that case turned on the *compulsive* feature of the West Virginia Regulation.

Mr. Justice Jackson, who wrote the opinion for the United States Supreme Court in the *Barnette* case, expressed the following views with respect to the compulsive features in that case as follows:

He said (319 U. S. 624) at page 630:

> "* * * The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement *as to the plaintiffs and those of that class.* * * *"

* * * *

and again at page 630:

> "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one and and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. * * *"

and at page 632:

> "* * * In the present case attendance is not optional. * * *"

and at page 642:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force* citizens to confess by word or act their faith therein. * * *"

In the *Barnette* case the resolution providing "that the salute to the flag become 'a regular part of the program of activities in the public schools,' that all teachers and pupils 'shall be required to participate in the salute * * *; provided, however, that refusal to salute the flag be regarded as an act of insubordination, and shall be dealt with accordingly'" was not declared unconstitutional. The lower Court held merely that it was "void insofar as it applies to children having conscientious scruples against giving such salute and that, as to them, its enforcement should be enjoined." The United States Supreme Court merely affirmed the judgment enjoining enforcement of the resolution as to children having conscientious scruples against giving such salute who were *compelled* to comply. Justice Jackson got to the crux of the whole matter in his statement that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force* citizens to confess by word or act their faith therein." (319 U. S. 642.) He did not say that the State could not provide courses of instruction "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government" (319 U. S. 325), or provide for the voluntary salute of the flag by the children in public schools.

The challenged statutes, R. S. 18:14–77 and R. S. 18:14–78, providing for the reading of the Old Testament and the saying of the Lord's Prayer in the opening exercises of public schools, thus recognizing God and the system of morality based on a belief in God as set forth in the Old Testament, do not compel or "force citizens to confess by word or act their faith therein." This recognition of God and the system of morality, based upon a belief in God, in "deference * * * to the conscientious scruples or religious convictions of the majority" does not contain any element of "compulsion which infringes on the religious scruples of any." (Cooley's Constitutional Limitations, Volume II, p. 983.)

The statutes involved do not provide for any such compulsion and the regulations of the defendant Board of Education specifically permit any student, so desiring, to be excused from the classroom, upon request to be excused, when the teacher or principal, as the case may be, is dutifully complying with said statutes. (P. 3b-14.)

POINT IV.

The New Jersey statutes under attack must be liberally construed in favor of the State of New Jersey since they were enacted pursuant to the police power reserved to the State.

The Appellants, at page 7 of their brief, state that this Court in the *Everson* vs. *Board of Education* (330 U. S. 1) and *McCollum* vs. *Board of Education* (338 U. S. 203) cases determined definitively that the restrictions upon Acts of Congress in the First Amendment were made applicable to the States by the Fourteenth Amendment, and that the principles applicable in the case at Bar were involved in those two cases.

We submit that this is a false premise for the simple reason that the principles embodied in the First Amendment could not be made wholly applicable to the States by the Fourteenth Amendment, since there is no Federal police power but there is a police power which has been reserved to the State of New Jersey. The *Everson* and *McCollum* cases, *supra*, involved regulations of the respective boards of education. In the case at Bar, however, the New Jersey Legislature meeting in solemn session as maker of the public policy of New Jersey enacted the statutes pursuant to the police power particularly reserved to the State in the interest of the public morals and public welfare. Hence Appellants' argument is obviously fallacious when based upon the premise that the First Amendment was made applicable to the States by the Fourteenth Amendment.

"Police power is the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals and general welfare of society. As applied to the powers of the States of the American Union, the term is also used to denote those inherent governmental powers which, under the Federal system established by the Constitution of the United States, are reserved to the several States."

16 Corpus Juris Secundum, "Constitutional Law," §174, p. 537.

It is fundamental that no part of the Federal Constitution was intended to hamper a valid exercise of state police regulation. None of the amendments was intended to interfere with the police power of the various States.

Particularly is it established by overwhelming authority that the Fourteenth Amendment was not designed to interfere with, curtail, restrain, destroy or take from the States the right to exercise the police power.

Louisville & N. R. Co. vs. *Melton*, 218 U. S. 36, 54 L. Ed. 921, 30 S. Ct. 676, 47 L. R. A. (N. S.) 84 (U. S. Sup., 1909).

Nebbia vs. *New York*, 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469 (U. S. Sup., 1933).

Wilkenson vs. *Rahrer*, 140 U. S. 545, 35 L. Ed. 572, 11 S. Ct. 865 (U. S. Sup., 1890).

Pacific Gas & Electric Co. vs. *Police Ct.*, 251 U. S. 22, 64 L. Ed. 112, 40 S. Ct. 79 (U. S. Sup., 1919).

Cunnius vs. *Reading School Dist.*, 198 U. S. 458, 49 L. Ed. 1125, 25 S. Ct. 721, 3 Ann. Cas. 1121 (U. S. Sup., 1904).

Terrace vs. *Thompson*, 263 U. S. 197, 68 L. Ed. 255, 44 S. Ct. 15 (U. S. Sup., 1923).

The Fourteenth Amendment does not limit the subjects upon which the police power of a State may be exerted.

Cunnius vs. *Reading School Dist., supra.*
Brim vs. *Jones*, 165 U. S. 180, 41 L. Ed. 677, 17 S. Ct. 282 (U. S. Sup., 1896).

"Police power" means the general power of the government to reserve and promote, among other things, the morals of the community even at the expense of private rights. Pursuant to said power, eleven states, in addition to New Jersey, have enacted statutes requiring the Bible to be read in the public schools: Alabama (1919), Arkansas (1930), Delaware (1915), Florida (1925), Georgia (1921), Idaho (1925), Kentucky (1924), Maine (1923), Massachusetts (1926), Pennsylvania (1913) and Tennessee (1915).

In Arkansas, in the General Election of 1930, an initiative act was approved by the voters which requires the Bible to be read daily, without comment, in the public schools.

Digest of Statutes of Arkansas, 1937, Vol. I, Sec. 3614.

The School Board of the District of Columbia in 1926 adopted a rule requiring the reading of the Bible and the repeating of the Lord's Prayer in the public schools.

By-Laws, Dist. of Columbia Bd. of Ed., Chap. 6, Sec. 4.

As stated by appellants (Ab-16) there are five states which have statutes specifically permitting, but not requiring, the Bible to be read in the public schools.

The North Dakota statute declares that the Bible is not a sectarian book and that it shall not be excluded from any public school.

N. Dakota Rev. Code, 1943, Title 15, Sec. 3812.

A Mississippi statute, though not specifically mentioning Bible reading, requires a suitable course of instruction in the "Principles of Morality and Good Manners," such course to "include what is known as the mosaic ten commandments."

Mississippi Code, 1942, Title 24, Sec. 6672.

There are several states in which the statutes are silent on Bible reading in the schools, but the courts have upheld the practice.

The Bible is read in a large number of schools in many states in which the statutes are silent on Bible reading in the schools.

Data based on reports of State Department of Education of each state, Church-State Relationships (1934), by Alvin W. Johnson, University of Minnesota Press, pp. 289, et seq.

No state has any constitutional or statutory provision specifically prohibiting Bible reading in the public schools.

Separation of Church and State, Johnson and Yost (1948), p. 35.

As far as we can find no statute requiring or permitting the reading of the Bible in the public schools has been declared unconstitutional.

The only South Dakota decision cited by appellants (appellants' brief, 13 fn, 18 fn, 27, 35) is *Finger* vs. *Weedman*, 226 N. W. 348 (S. Dakota Supreme Ct., 1929). The court in that case, while its opinion is adverse to Bible reading in the schools, did not declare the state statute unconstitutional. It merely compelled the school board to readmit the children who had been expelled for not attending the opening exercises during the reading of the Bible, and

directed the board thereafter to permit them to be excused from the school room during such exercises. The President Judge and one other judge wrote dissenting opinions. It is interesting to note that in the majority opinion the view is expressed that the public schools can, without opposition, "teach that there is an All-Wise Creator to whom we owe love, reverence, and obedience" (226 N. W. 350), and the court expresses the further view that the Douay version of the Bible and the King James version, "if used to teach morals, the morals of one are as elevating as the other, and there is no substantial difference." (226 N. W. 351.)

Appellants state (Ab-17) that the reading of the Bible in the public schools has been struck down in Ohio, Wisconsin, Illinois and Louisiana.

The Ohio case cited by appellants (Ab-15; 17fn) is *Board of Education* vs. *Minor*, 23 Ohio St. 211, 13 Am. Rep. 233 (Ohio Supreme Ct., 1872), in which the Board of Education of Cincinnati adopted a rule prohibiting the reading of the Bible in the public schools. The plaintiffs therein, who were taxpayers, filed a bill to enjoin the board from enforcing said rule. There being no legislation on the question, the Court held that the Board could not be compelled to permit the reading of the Bible in the schools. The Court said that it is exclusively within the jurisdiction of the school board to exclude Bible reading. Inferentially the case holds that the school board could direct the reading of the Bible, though the wisdom of doing so is questioned by the Court. In a later case in Ohio the Court held that a regulation of a school board requiring that a portion of the Bible shall be read in the opening exercises in the public schools is not unconstitutional, such regulation being exclusively within the jurisdiction of the school board.

Nessle vs. *Hum*, 1 Ohio N. P. 140, 2 Ohio S. & C. P. 60 (1894).

It is estimated that 85% of the schools in Ohio have Bible reading.

Church-State Relationships in the United States, Johnson, p. 308.

The Wisconsin case cited by plaintiffs (appellants brief, 13 fn, 17 fn, 22, 30, 36) is *State ex rel. Weiss* vs. *District Board of Education,* 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330, 2 Am. St. Rep. 41 (Wis. Supreme Ct., 1890), in which the court held that use of the Bible as a textbook in the class rooms violated the state constitution. No state law requiring or permitting the reading of the Bible in the schools was involved in the case. The following language contained in the opinion of Judge Lyon is inconsistent with the conclusion reached in the three separate opinions in that case:

"Hence, to teach the existence of a Supreme Being of infinite wisdom, power and goodness, and that it is the highest duty of all men to adore, obey and love Him, is not sectarian, because all religious sects so believe and teach. The instruction becomes sectarian when it goes further and inculcates doctrine or dogma concerning which the religious sects are in conflict. * * * It should be observed in this connection that the above views do not, as counsel seemed to think they may, banish from the district schools such textbooks as are founded upon the fundamental teachings of the Bible, or which contain extracts therefrom. * * * Such textbooks are in the schools for secular instruction and rightly so, and the constitutional prohibition of sectarian instruction does not include them, even though they may contain passages from which some inferences of sectarian doctrine might possibly be drawn. Furthermore, there is much in the Bible which cannot justly be characterized as sectarian. * * * It may also be used to inculcate good morals—that is,

> our duties to each other—which may and ought to be inculcated by the district schools. * * * Concerning the fundamental principles of moral ethics, the religious sects do not disagree." (44 N. W. 973 and 974.)

The only cases decided prior to the *Weiss* case, which could be considered adverse to Bible reading in the public schools were one or two cases holding that a board of education cannot be compelled to cause the Bible to be read in public schools. The Maine, Massachusetts, Illinois, Iowa and Pennsylvania courts had theretofore held that Bible reading in the public schools did not violate any constitutional provision. *Donohoe* vs. *Richards*, 38 Maine 379, 61 Am. Dec. 256 (1854); *Wall* vs. *Cooke*, 7 Am. L. Reg. 417 (Mass., 1859); *Spiller* vs. *Woburn*, 94 Mass. 127 (1866); *McCormick* vs. *Burt*, 95 Ill. 263, 35 Am. Rep. 163 (1880); *Moore* vs. *Monroe*, 64 Iowa 367, 20 N. W. 475, 52 Am. Rep. 444 (1884); and *Hart* vs. *School Dist.*, 2 Lanc. Law Rev. 346 (Penna., 1885).

The court in the *Weiss* case brushed those cases aside (citing some of them) with a statement that the provisions of the constitutions of those states are not similar to the provisions of the Wisconsin constitution, without pointing out the dissimilarities.

The opinion of Judge Cassoday in the *Weiss* case cites and quotes (44 N. W. 978) from the *Girard Will* case (*Vidal* vs. *Girard Executors*, 2 Howard 127, 11 L. Ed. 205, decided in 1844), but seems to overlook the fact that Mr. Justice Story in that case held that it was sectarianism that was prohibited by Girard's will (which appointed the City of Philadelphia as trustee) and that the Bible is not a sectarian book and that it could be, and should be, taught at Girard College.

See discussion of the *Vidal* case and *Weiss* case in *Hackett* vs. *Brooksville Graded School Dist.*, 120 Ky. 608, 87 S. W. 792, 795, 797, 69 L. R. A. 592 (Kentucky Ct. of App., 1905).

The *Vidal* case, decided more than 100 years ago, is of utmost importance, not only on the question as to whether the Bible is a sectarian book but because of the court's discussion of the provisions of the Pennsylvania constitution, which Judge Cassoday said in the *Weiss* case are "quite similar" to the provisions of the Wisconsin constitution, although he failed to consider the Pennsylvania case of *Hart* vs. *School District*, 2 Lanc. Law Rev. 346 (1885), in which an injunction to prevent the reading of the King James version of the Bible in the public schools was denied.

In the *Vidal* case, Justice Story says:

> "* * * Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, *not sectarian*, upon the general evidences of Christianity, from being read and taught in the college by lay teachers? * * * Where are benevolence, the love of truth, sobriety, and industry, so powerfully and irresistibly inculcated as in the sacred volume? * * * All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means; and of course including the best, the surest, and the most impressive." (2 Howard 20, 11 L. Ed. 235.)

This language of one of the most highly respected justices in the history of the Supreme Court is applicable to the case at bar.

The Illinois case cited by appellants (appellants' brief, 13 fn, 17 fn, 22, 23, 26, 30) is *People ex rel. Ring* vs. *Board of Education*, 245 Ill. 334, 92 N. E. 251, 29 L. R. A. (N. S.) 442, 19 Ann. Cas. 220 (Ill. Supreme Ct., 1910), in which

the court condemned exercises in the public schools consisting of Bible reading, singing of hymns and the repeating of the Lord's Prayer. During the reading from the Bible and the reciting of the Lord's Prayer the pupils were required to rise in their seats, fold their hands and bow their heads, and from time to time certain pupils were asked to explain the meaning of certain passages of the Bible read. No state statute or regulation of the school board was involved in the case. The court's opinion, which is adverse to Bible reading in the public schools, brushes aside without thorough consideration the decisions of the Maine, Massachusetts, Illinois, Iowa, Pennsylvania, Ohio, Michigan, Nebraska, Kansas, Kentucky and Texas courts in which it had theretofore been held that Bible reading in the public schools does not violate any constitutional provisions of those states.

Donohoe vs. *Richards*, supra (Maine); *Wall* vs. *Cooke*, supra (Mass.); *Spiller* vs. *Woburn*, supra (Mass.); *McCormick* vs. *Burt*, supra (Ill.); *Moore* vs. *Monroe*, supra (Iowa); *Hart* vs. *School Dist.*, supra (Penna.); *Nessle* vs. *Hum*, supra (Ohio, 1894); *Pfeiffer* vs. *Bd. of Ed.*, 118 Michigan 560, 77 N. W. 250 (1898); *Curran* vs. *White*, 22 Pa. Co. Ct. 201 (1898); *Stevenson* vs. *Hanyon*, 7 Pa. Dist. Rep. 585 (1898); *Freeman* vs. *Scheve*, 65 Neb. 876, 93 N. W. 169 (1903); *Billard* vs. *Bd. of Ed.*, 69 Kansas 53, 76 Pac. 422 (1904); *Hackett* vs. *Brooksville Graded School Dist.*, 120 Ky. 608, 87 S. W. 792 (1905); and *Church* vs. *Bullock*, 104 Texas 1, 109 S. W. 115 (1908).

The *Ring* opinion is based upon a short quotation from the Ohio case of *Board of Education* vs. *Minor*, supra, in which it was held that a school board cannot be *compelled* to cause the Bible to be read in the public schools, the Wisconsin case of *Weiss* vs. *District Board*, supra, in which the Bible as a textbook was excluded from the public schools, and the Nebraska case of *Freeman* vs. *Scheve*, 65 Neb. 853, 91 N. W. 846, 59 L. R. A. 927 (Neb. Supreme Ct., 1902), motion for rehearing overruled 65 Neb. 876, 93 N. W. 169, 59 A. L. R. 932 (1903), the opinion in which, on rehearing, says that the Bible may be read in public schools.

In an excellent dissenting opinion written by two of the judges in the *Ring* case it is demonstrated beyond doubt that the bill of rights in every state constitution was designed to prevent "denominational or sectarian instruction." (92 N. E. 258.) The majority opinion does not cite the United States Supreme Court decision in *Vidal* vs. *Girard*, supra, which is cited in the dissenting opinion. (92 N. E. 238.) The judges who dissented in the *Ring* case said:

> "* * * To hold that the Bible cannot be read in the public schools requires a judicial determination that it teaches the doctrine of some sect, and *if that is so we ought to be able to say what sect.*
>
> "* * * The Constitution is not directed against the Bible, but applies equally to all forms and phases of religious beliefs. If the Bible is to be excluded because it pertains to a religion and a future state, heathen mythology must go with it. Moral philosophy must be discarded because it reasons of God and immortality, and all literature which mentions a Supreme Being, or intimates any obligations to Him, must be excluded. We cannot conceive that the framers of the Constitution, or the people, intended that the best and most inspiring literature, history, and science should be excluded from the public schools, so that nothing should be left except that which has been sterilized, so as not to interfere with the beliefs or offend the sensibilities of atheists." (92 N. E. 265.)

The decision in the *Ring* case is contrary to a prior decision of the Illinois Court which sustained a rule of the state university requiring students to attend chapel services, consisting of Bible reading, reciting of the Lord's Prayer and occasional non-sectarian talks.

North vs. *University of Illinois*, 137 Ill. 296, 27 N. E. 54 (1891).

Since the decision in the *Ring* case, the Illinois Supreme Court found no objection to the construction by church authorities of a Roman Catholic Chapel on the public premises of the Cook County poor farm.

Reichwald vs. *Catholic Bishop*, 258 Ill. 44, 101 N. E. 266 (1913).

The Louisiana case cited by appellants (appellants' brief, 13 fn, 17 fn, 31) is *Herold* vs. *Parish Board*, 136 La. 1034, 68 So. 116, L. R. A. 1915D 941, Ann. Cas. 1916A 806 (La. Supreme Ct., 1915), in which a school board resolution requested the teachers (deemed by the court to be a command) to open sessions of the public schools with readings from the Bible and the Lord's Prayer. The court cited the *Weiss* case as authority to the effect that courts take judicial notice of the contents of the Bible, numerous sects and general doctrines, but did not cite that case as authority for its conclusions. Nor did it cite or rely upon any other case except *Shreveport* vs. *Levy*, 26 L. Ann. 671, which it cited only as authority to the effect that Jews and Gentiles "must be treated alike." (68 So. 121.) While the court in the *Herold* case declared the resolution unconstitutional, that case does not support the contentions of the appellants in the instant case. It does support the respondent's contention that the reading of the Old Testament in the public schools is not prohibited by any constitutional provision.

The court in the *Herold* case quotes from Story's Commentaries on the Constitution a statement of what he conceived to be the true meaning of the First Amendment. (68 So. 120.) The court concluded that the reading of the New Testament violated the conscience of the Jew and set aside the resolution because, and only because, it provided for reading of both the Old and New Testaments. There can be no doubt that it would have sustained the resolution had it restricted the reading of the Bible to the Old Testament. The court states that our Country is a "godly land" and "we are a religious people" (68 So. 119), that Catholic

children are *not* prohibited by their church "from reading the Bible without authoritative comment" (68 So. 118), that neither Catholic, Protestant or Jew can object to the reading of the Old Testament. The court also says that a Christian, either Catholic or Protestant, can have no objection to the repeating of the Lord's Prayer in the public schools. Nowhere in the opinion does the court say that a Jew can object to such repeating of that prayer, nor can it be successfully demonstrated that any one who believes in God can have any objection to that prayer. It contains not one word relative to Christ or any belief with respect to God which the Jew does not have in common with the Christian. True, it was given to Christians by Christ, but it is addressed to "Our Father which art in heaven." Certainly a Jew can have no objection to that. Throughout the Old Testament Jehovah God is spoken of as the Father of the Jews. The Prayer expresses reverence for God and trust in him (as does the Declaration of Independence) and praise for him (as does the Star Spangled Banner).

Offering a prayer at the beginning of school each day, asking direction and guidance, which does not represent any sect or denomination, is constitutionally unobjectionable.

Hackett vs. *Brooksville Graded School District*, supra.

The Nebraska case cited by plaintiffs (appellants' brief, 18 fn, 26, 39) is *State ex rel. Freeman* vs. *Scheve* (supra), 65 Neb. 853, 91 N. W. 846, 59 L. R. A. 927. Motion for rehearing overruled 65 Neb. 876, 93 N. W. 169, 69 L. R. A. 932 (Neb. Supreme Ct., 1903), in which the court issued a peremptory writ of mandamus to compel a school board to cause a certain teacher to discontinue reading from the Bible, singing certain "sectarian songs," and offering prayer to the Deity, in accordance with the doctrines, beliefs, customs or usages of sectarian churches, during school hours in the presence of the pupils. No state law or regulation of the school board was involved in the case.

The opinion written by Commissioner Ames and concurred in by two other commissioners, in which no cases are cited except the *Weiss* case, supra, is adverse to Bible reading in the public schools. The Court, in a per curiam opinion, directed the issuance of the peremptory writ for the reasons stated in the opinion of Commissioner Ames. Judge Sedgwick concurred "in the conclusion reached by the commissioners solely on the ground that the exercises complained of were 'sectarian instruction' within the meaning of the Constitution." (91 N. W. 848.) Judge Holcomb concurred only insofar as it was held that the exercises "as conducted" (91 N. W. 848) violate the constitution, and said, referring to the opinion of the Commissioners:

> "* * * If the views therein expressed are sound, then it would seem that it is in the power of any taxpayer to prevent religious exercises in any of the penal, reformatory, or eleemosynary institutions in the state, and to close the doors of the state capitol to the chaplains of both branches of the legislature. * * * The Bible itself is not a sectarian book, and it is an erroneous conception to so regard it. * * *." (91 N. W. 848.)

On rehearing in the *Freeman* case, the court, in an opinion written by the Chief Justice (65 Neb. 876, 93 N. W. 169, 59 L. R. A. 932) says that the Bible may be read in the public schools:

> "* * * The decision does not, however, go to the extent of entirely excluding the Bible from the public schools. It goes only to the extent of denying the right to use it *for the purpose of imparting sectarian instruction.* * * * Why may not the Bible also be read without indoctrinating children in the creed or dogma of any sect? Its contents are largely historical and moral. Its language is unequaled in jurity and elegance. Its style has never been surpassed. Among the classics

of our literature it stands pre-eminent. * * * But the fact that the King James translation *may* be used to inculcate sectarian doctrines affords no presumption that it will be so used. *The law does not forbid the use of the Bible in either version in the public schools.* It is not proscribed either by the Constitution of the statutes, and the courts have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. * * * The section of the Constitution which provides that 'no sectarian instruction shall be allowed in any school or institution supported, in whole or in part, by the public funds set apart for educational purposes,' cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible, nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the state. * * * " (93 N. W. 171, 172.)

Pennsylvania, Ohio and Nebraska should be added to the appellants' list (appellants' brief, 17) of states in which the courts have held that the Bible may be read in the public schools.

Hart vs. *School Dist.* (supra), 2 Lanc. Law Rev. 342 (Pa., 1885);
Curran vs. *White* (supra), 22 Pa. Co. Ct. 201 (1898);
Stevenson vs. *Hanyon* (supra), 7 Pa. Dist. R. 585 (1898);
Nessle vs. *Hum* (Ohio), supra;
Freeman vs. *Scheve* (Neb.), supra.

In *Moore* vs. *Monroe* (supra), 64 Iowa 367, 20 N. W. 475 (appellants' brief, 17 fn), Bible reading in the public schools was sustained, notwithstanding the fact that the

Iowa Constitution provides that "The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Constitution of Iowa, Art. 1, sec. 3.

The practice of reading the Bible and repeating the Lord's Prayer in the opening exercises of public school does not foster or propagate sectarian doctrines and does not constitute a use of tax-supported property or the tax-supported school system for sectarian purposes and does not "destroy or weaken or affect the cleavage between church and state"; it "does not bridge or conjoin the two."

Lewis vs. *Bd. of Ed.*, 157 Misc. 520, 285 N. Y. Supp. 164, 174 (1935), modified in other respects in 247 App. Div. 106, 286 N. Y. Supp. 174 (1935), rehearing denied in 247 App. Div. 873, 288 N. Y. Supp. 751 (1936), appeal dismissed in 276 N. Y. 490, 12 N. E. (2d) 172 (N. Y. Ct. of Appeals, 1937).

POINT V.

The reading of at least five verses of the Old Testament, without comment, and the repeating of the Lord's Prayer in the opening exercises of public schools are not prohibited by the First and Fourteenth Amendments to the Constitution of the United States.

Our Founding Fathers certainly did not intend that there should be hostility between church and state, between religion and government, nor public recognition of religion be eliminated. The Declaration of Independence disposes of that contention when it asserts as a self-evident truth that "All men are endowed by their Creator with certain inalienable rights; and that to secure these rights, governments are instituted among men."

The Supreme Court of the United States (*Gulf, Colorado & Santa Fe Rwy. Co.* vs. *Ellis*, 165 U. S. 150, at 160 (1897)), has said:

> ". . . the latter (the Constitution), is but the body and the letter of which the former (the Declaration of Independence), is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." (Parentheses ours.)

Obviously, the intention of the founding fathers was to affirm that the aforementioned inalienable rights of the citizen come from the Creator and not from the State and that the function of the State is to secure those rights, not to grant them.

The Constitution therefore, and particularly the First Amendment, must be read and interpreted in the notion that this is a "believing" nation. On this point it is interesting and informative to review the events leading up to the adoption of the First Amendment at the first session of the first Congress after the adoption of the new Constitution of the United States. James Madison, on June 8, 1789, made the following two proposals:

1. In Article 1, Section 9 of the Constitution:

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any *national* religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." (Italics ours.)

Annals of Congress, Vol. I, p. 434.

By August 15, 1789, the form of Madison's proposal under consideration in the House of Representatives had been altered to:

> "No *religion* shall be established by law, nor shall the equal rights of conscience be infringed. (Italics ours.)
>
> Annals of Congress, Vol. I, p. 729.

As the debate in the House of Representatives continued, Samuel Livermore, of New Hampshire, proposed that the wording should be as follows:

> "Congress shall make no laws *touching* religion, or infringing the rights of conscience." (Italics ours.)
>
> Stokes, "Church and State in the United States," Vol. I, p. 543.

Justice Story in his commentaries on the Constitution of the United States said:

> "It yet remains a problem to be solved in human affairs whether any free government can be permanent where the public worship of God and the support of religion constitute no part of the policy or duty of the state in any assignable shape."
>
> Story, "Commentaries on the Constitution of the United States" (Fifth Edition), p. 631.

On August 20, 1789, Fisher Ames, of Massachusetts, proposed that the religious clause of the First Amendment should read:

> "Congress shall make no law *establishing* religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." (Italics ours.)
>
> Annals of Congress, Vol. I, p. 766.

On August 20, by a two-thirds vote of the House of Representatives, the two original proposals of Madison were accepted, but the Senate of the United States refused to accept the House draft of the proposed Amendment.

The following is the form of the proposed religious clause of the First Amendment as it came to the Senate:

> "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

There was long debate in the Senate and varied compromises were attempted. The following was substituted for the House proposal, but also was defeated:

> "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."
>
> Journal of the First Session of the Senate (Gales and Seaton, 1820).

Finally, on September 9, 1789, the Senate adopted the following text:

> "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."
>
> Journal of the First Session of the Senate, *supra*, p. 70.

On September 21, 1789, the House of Representatives refused to accept the Senate form of the religious clause of the First Amendment. After a conference the following language was adopted by both Houses on September 25, 1789, and was subsequently ratified as the religious clause

of the First Amendment: "Congress shall make no law respecting *an establishment of religion, or prohibiting the free exercise thereof.*" (United States Constitution Amendments, Article I; *Reynolds* vs. *United States*, 98 U. S. 145, 2 L. Ed. 244 (U. S. Sup., 1878).

The philosophy leading to the adoption of the First Amendment was not the complete separation of Church and State, but rather to enact the constitutional principle of "no established Church or Religion."

Davis vs. *Beason*, 133 U. S. 333; 33 L. Ed. 637; 10 S. Ct. 299 (U. S. Sup., 1890).

The modern idea of "separation of Church and State," is an attempt to substitute those particular words for the very specific language of the First Amendment.

In substantiation of this position, and as a basic reason for the passage of the First Amendment, we find in *Davis* vs. *Beason*, *supra*, at page 342 the following remark:

> "The oppressive measures adopted and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform in their religious beliefs and modes of worship, to the views of the most numerous sect and the folly of attempting in that way to control mental operations of persons and enforce an outward conformity to a prescribed standard led to the adoption of the (first) amendment in question." (Parenthesis ours.)

The right of a man to worship God or even refuse to worship God, is as fundamental in a free government like ours, as is the right to life, liberty or the pursuit of happiness. *Knowlton* vs. *Baumhover*, 183 Iowa 671, 166 N. W. 202, 2 A. L. R. 841 (S. C., Iowa, 1918); *Cline* vs. *State*, 9 Okla. Crim. Rep. 40, 130 P. 510, 45 L. R. A., N. S. 108 (Cr. Ct. App., Okla., 1913).

However, in order to violate the constitutional right to religious freedom, a statute must work an establishment of a religion, or prohibit the free exercise thereof. It must provide for compulsory support, by taxation, or otherwise, or religious instruction, make attendance upon religious worship compulsory, work a restriction upon the exercise of religion according to the dictates of conscience, or impose restrictions upon the expression of religious belief. *State ex rel. Temple* vs. *Barnes*, 22 N. D. 18, 132 N. W. 215, 37 L. R. A. N. S. 114, Ann. Cas. 1913, E. 930 (S. C., N. D., 1911).

Appellants in their brief rely for the most part on *McCollum* vs. *Board of Education*, 333 U. S. 203, 92 L. Ed. 649, 68 Sup. Ct. 461, 2 A. L. R. (2d) 1338 (U. S. Sup., 1948). An analysis of the various opinions in the case, however, reveals that the *case actually supports the argument of the appellees* and that the holding in that case is directed against sectarianism in the public schools—that what the Court actually meant was a wall of separation between sectarianism and government.

The facts were as follows:

In 1940, interested members of the Jewish, Roman Catholic and a few of the Protestant faiths, formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades 4 to 9, inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; they were held weekly, 30 minutes for the lower grades and 45 minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools. The classes were taught in three separate religious groups by Protestant teachers, Catholic Priests and Jewish Rabbis, although for several years past there were apparently no classes instructed in the Jewish religion. Classes were conducted in the regular classrooms

of the school building. *Students who did not choose to take the religious instruction were not released from public school* duties; they were required to leave their classrooms and go to some other place in the school building to pursue their secular studies. On the other hand, *students who were released from a secular study for the religious instructions were required to be present at the religious classes.* Reports on their presence or absence were to be made to their secular teachers.

Mr. Justice Frankfurter at page 212 said:

> "Illinois has here authorized the commingling of *sectarian* with secular *instruction in the public schools.* The Constitution of the United States forbids this."

Obviously, the decision is directed only against sectarianism and sectarian religious instruction conducted by religious teachers who were subject to the approval and supervision of the public school authorities. That decision is no authority for a blanket prohibition, such as is sought here, of the reading of extracts from the Old Testament, particularly when any child whose parents so desire may be excused from attendance at such reading.

The same Justice said at page 213:

> "But agreement, in abstract that the First Amendment was designed to erect a wall of separation between Church and State does NOT preclude a clash of views as to what the wall separates. Involved is not only the constitutional principle but the implications of judicial review in its enforcement. Accommodation of legislative freedom and constitutional limitation upon that freedom cannot be achieved by a mere phrase."

Then after continuing a historical analysis of the problem and the phrase, the Justice continued "Enough has

been said to indicate that we are dealing not with a full blown principle, nor one having the definiteness of a surveyor's metes and bounds." Speaking further as to the aspects of the factual case of "released time" upon which the action in the *McCollum* case was predicated, Justice Frankfurter continued by saying (page 225):

> "Of course 'released time' as a generalized conception undefined by differentiating particularities is not an issue for constitutional adjudication. Local programs differ from each other in many and crucial respects. Some 'released time' classes are under separate denominational auspices, others are conducted jointly by several denominations often embracing all of the religious affiliations of a sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. In so far as these are manifestations merely of the free exercise of religion, THEY ARE QUITE OUTSIDE THE SCOPE OF JUDICIAL CONCERN, except in so far as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular released time program that close judicial scrutiny is demanded of the exact relation between religious instruction and the public educational system in the SPECIFIC SITUATION BEFORE THE COURT."

It is thus apparent that the only thing the *McCollum* case decided, was the law as applicable to the state of facts then before the Court *and no others*. Justice Frankfurter continuing stated (p. 231):

> "We do not consider as indeed we could not, school programs not before us, which though colloquially characterized as released time, present situations differing in aspects that may well be constitutionally crucial. * * * We do not now attempt to weigh, on

the constitutional scale, every separate detail or various combination of factors which MAY ESTABLISH A VALID 'RELEASED TIME PROGRAM.'" (Indicating that even "released time" is constitutional under proper circumstances.)

Mr. Justice Jackson in concurring stated at page 234:

> "The plaintiff, as she has every right to be, is an avowed atheist. What she has asked of the courts is that they NOT ONLY END THE 'RELEASED TIME' PLAN BUT ALSO BAN EVERY FORM OF TEACHING WHICH SUGGESTS OR RECOGNIZES THERE IS A GOD. She would ban all teaching of the Scriptures. She especially mentions as an example of invasion of her rights 'having pupils learn and recite such statements as "The Lord is my Shepherd I shall not want." And she objects to teaching that the King James version of the Bible "is called the Christians Guide Book," 'the Holy Writ and the Word of God,' and many other similar matters. This Court is directing the Illinois courts generally to sustain plaintiff's complaint without exception of any of these grounds of complaint, without discriminating between them and without laying down any standards to define the limits of the effect of our decision."

Continuing Justice Jackson states:

> "To me the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate (Such as our case now at Bar) if we do not place appropriate limitation on our decision and exact strict compliance with judicial requirements. Authorities list 256 separate and substantial religious bodies to exist in continental United States. Each of them through the suit of some discontented but unpenalized and untaxed representative has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their

teaching everything inconsistent with their doctrines. IF WE ARE TO ELIMINATE EVERYTHING THAT IS OBJECTIONABLE TO ANY OF THESE WARRING SECTS OR INCONSISTENT WITH ANY OF THEIR DOCTRINES, WE WILL LEAVE PUBLIC EDUCATION IN SHREDS. NOTHING BUT EDUCATION CONFUSION AND A DISCREDITING OF THE PUBLIC SCHOOL SYSTEM CAN RESULT FROM SUBJECTING IT TO CONSTANT LAW SUITS." (Parenthesis ours.)

Continuing Justice Jackson said:

"While we may and should end such formal and explicit instruction as the Champaign Plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's, completely to isolate and cast out of secular education ALL THAT SOME PEOPLE MAY REASONABLY REGARD AS RELIGIOUS INSTRUCTION. * * * But it would not seem practical to teach either practice or appreciation of arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral or painting without the scriptural themes would be eccentric and incomplete even from a secular point of view. * * * The fact is, that for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life is saturated with religious influences derived from paganism, Judaism, Christianity, both Catholic and Protestant and other faiths accepted by a large part of the world's people. * * *"

Following that decision, and apparently in reliance upon it, there was presented for consideration to the Supreme Court, Albany County, New York, a second proceeding by Joseph Lewis which was the subject of a decision by Mr. Justice Elsworth of that Court in November, 1948. In that decision the Court outlined at length the distinctions

existing between the Champaign plan considered by the Supreme Court of the United States and the released time program in New York, before that Court for consideration. In a well reasoned opinion, Mr. Justice Elsworth said (193 Misc. 66, 73):

> "In view of the opinion herein expressed that the decision in the *McCollum* case does not make 'Released Time' as such unconstitutional, the programs challenged in this proceeding can only be condemned upon a finding that they are in aid of religion. That is the ground upon which the decision in the *McCollum* case is predicated. This court cannot so find. It believes the New York plan free from the objectionable features which motivated the United States Supreme Court to declare the Champaign plan unconstitutional."

Appeal from this decision was dismissed by the New York Court of Appeals (276 N. Y. 90).

The other case relied on so strongly by appellants is that of *People ex rel. Ring* vs. *Board of Education*, 245 Ill. 344, 92 N. E. 251, 29 L. R. A. N. S. 442 (Ill. Sup. Ct., 1910).

In the *Ring* case, there were definite, overt, participatory acts required of the students. These acts consisted of *requiring* students to rise in their seats, fold their hands, bow their heads, and then to sing aloud selected hymns, to repeat audibly the Lord's Prayer and from time to time to *explain the meaning of certain passages of the Scriptures read.* We do not dispute the unconstitutionality of these requirements and agree with the Illinois Supreme Court, which, speaking through DUNN, *J.*, said at page 252 of Vol. 92, Northeastern Reporter:

> "The exercises mentioned in the petition constitute worship. * * * Their *compulsory* performance would be a violation of the constitutional guaranty of the free exercise and enjoyment of religious profession and worship. One does not enjoy the free exercise of reli-

gious worship who is *compelled* to join in any form of religious worship."

However, there are no such requirements in our New Jersey statutes (R. S. 18:14–77 and 78.)

(All italics ours.)

POINT VI.

The prohibition against "aid to religion" is not directed against such things as reading from the Old Testament without comment and recital of the Lord's Prayer in the Public Schools.

Today there is a real necessity for clearly defining the boundaries of the principle of separation of Church and State and limiting the application of the principle in such a way that it will be harmonious with the basic traditions of our public school system and our country.

We in the United States have always had separation of Church and State along with Bible reading in our public schools. Appellants argue that the principle of separation of Church and State; that is, absolute separation, made this country great and is the foundation of the public school system. However, if this be true, we question appellants' ability to harmonize their argument with the fact that our founding fathers always associated Bible reading with religious liberty. Co-operation of Church and State is one of the principal factors underlying the liberty which the people enjoy today. Obviously, if Bible reading in the public schools violates the concept of separation of Church and State then our public school system would not have developed so effectively.

The argument of appellants is a new one. It attempts to jettison the traditional interpretation of the principle of separation of Church and State and establish in its place the continental concept which has resulted in the secularization and socialization of the private institutional system —in many countries the complete annihilation of the pri-

vate institutional system. The public school system reflects free enterprise and local option. The opposition would attempt to eliminate these factors and strait-jacket it by the concept of separation.

This Court held in the *McCollum* and *Everson* cases, *supra*, that a State may not pass laws which "aid" religion. The appellants now attempt to pervert the decisions of the Court by arguing in effect that by the word "aid" the Court meant that there should be no recognition of religion by government, no co-operation for the common good between government and religion and, if their argument is followed to its logical end, that there should be actual hostility between government and religion. We submit that the Constitution must not be interpreted in this vein and that nonsectarian recognition of God and religion and co-operation between religion and the State or government were not interdicted where they foster the growth of the community and at the same time preserve the rights of the individuals within the community. This is the real vital principle which has given a distinctive character to democracy as we in the United States of America know it. We submit that any attempt to interpret the word "aid" so broadly as to exclude all co-operation between Church and State encounters a conflict between two portions of the *Everson* decision, *supra:* the one which sets forth the Court's concept of Church and State; the other which says that the State may not be the adversary of religion. The middle ground and the constitutional ground is co-operation consistent with religious liberty.

That this is the correct approach is clearly demonstrated by the numerous instances in our laws and other public utterances wherein the Deity or religion are mentioned. To name only a few we respectfully call the Court's attention to oaths which must be taken by those appointed to this Court and by Federal officeholders, both of which conclude with the phrase: "So help me God"; to the United States coined dollar containing the words: "In God We Trust"; to the daily invocation of Divine blessings by

chaplains of Congress; to commissioned chaplains in the armed forces; to our National Anthem, and to the President's most recent Thanksgiving Day Proclamation issued on November 1, 1951, which read as follows:

"More than three centuries ago the Pilgrim Fathers deemed it fitting to pause in their Autumn labors and to give thanks to *Almighty God* for the abundant yield of the soil of their homeland. In keeping with that custom, hallowed by generations of observance, our hearts impel us, once again in this Autumnal season, to turn in humble gratitude to *the giver of our bounties.*

"We are profoundly grateful for the *blessings bestowed upon us*: The preservation of our freedom, so dearly bought and so highly prized; our opportunities for human welfare and happiness, so limitless in their scope; our material prosperity, so far surpassing that of earlier years; and our private spiritual blessings, so deeply cherished by all. For these *we offer fervent thanks to God.*

"With the co-operation of our Allies we are striving to attain a permanent peace, and to assure success in achieving the coveted goal we reverently place *our faith in Almighty.*

"Now, Therefore, I, Harry S. Truman, President of the United States of America, according to our treasured tradition, and in conformity with the joint resolution of Congress approved on December 26, 1941, designating the fourth Thursday of November in each year as Thanksgiving Day, do hereby proclaim Thursday, November 22, 1951, as a day of national thanksgiving. *Let us all* on that day, in our homes and in our places of Worship, individually and in groups, *render homage to Almighty God.* Let us recall the words of the Psalmist, 'O *give thanks unto the Lord;* for *He is good;* For *His mercy endureth forever.*' Let us also, on the appointed day, *seek divine aid* in the quest for Peace." (Italics ours.)

CONCLUSION.

It is respectfully submitted that the judgment of the New Jersey Supreme Court should be affirmed and the appeal dismissed upon the following grounds: (1) appellants have not shown sufficient injury to raise a substantial Federal question in their suits as citizens and taxpayers; (2) they are estopped; (3) Bible reading and recital of the Lord's prayer in the public schools of New Jersey and elsewhere amount to nonsectarian recognition of God in the schools which is not forbidden by the First Amendment; (4) since all or any of the students may be excused from the exercises there is no compulsive feature; (5) the statutes under attack were enacted by the State of New Jersey pursuant to a valid exercise of the police power reserved to the states; the practices provided for in the statute do not violate the First and Fourteenth Amendments of the Federal Constitution; (7) the practices provided for in the Statutes do not "aid" religion in the manner prohibited in the *Everson* and *McCullom* cases.

Respectfully submitted,

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